

## Notice Provisions - A Change in Attitude?

John B Molloy, LLB(Hons), BSc(Hons), FHKIS, FRICS, FInstCES, MCIArb, RPS(QS), Managing Director, James R Knowles (Hong Kong) Limited

In March 1998 I wrote an article in this journal entitled 'The Importance of Giving Notice'. The article considered the requirements in contracts to give notice as the first step in the procedure for securing an extension of time.

In particular the article considered whether a notice provision in a contract, which made the giving of notice a condition precedent to the granting of an extension of time, would leave the employer's rights to claim liquidated damages intact in the event that there was a delay caused by the employer but the contractor had failed to serve a notice and thus received no extension of time.

On the basis of the court's decision in the then recent Australian case of Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd (1994) where Justice Cole stated:

*"If the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of the time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct."*

The article concluded that the court had confirmed that if a contractor is delayed by the employer and/or the Architect/ Engineer, then they must comply with the notice provisions contained in the contract (regardless of whether the notice provisions are conditions precedent or not) if they are to be entitled to an extension of time. If they do not do so, they will be unable to claim that time is at large and must complete the

work by the due date and pay liquidated damages if they do not.

Well the matter has been revisited recently by the courts, again in Australia in the interesting and potentially important case of Gaymark Investments Pty Ltd v Walter Construction Group Ltd (20 December 1999), where the court came to a rather different conclusion.

Traditionally, whilst most standard forms of construction contract make it necessary to give notice when an event that may give rise to an extension of time is encountered, it is relatively unusual for such to be a condition precedent to the grant of an extension of time, i.e. no notice - no extension of time can be granted.

In Hong Kong, only the KCRC Conditions of Contract make the giving of notice a condition precedent to an extension of time, although a number of local PQS firms attempt to write special conditions for the Private Form that intend (with varying degrees of success) to achieve this result.

The reason why most forms have traditionally shied away from making their extension of time notices a condition precedent to the grant of an extension of time is because it used to be thought that it would be dangerous to do so, because in the event that the delay had been caused by the employer the contractor could claim that time was 'at large'.

Time becomes 'at large' where the employer causes a delay to the progress of the works and there is no provision in the contract to grant an extension of time for that delay. The effect of time being at large is that the employer loses the right to liquidated damages and the contractor's obligation is

only to complete the works within a reasonable time.

It was felt that if the employer caused a delay and the contractor failed (for whatever reason) to serve notice within the time specified in the contract, that if the giving of notice was a condition precedent to the right to an extension of time, then the contractor could claim that time was at large.

The Turner Corporation case appeared to have laid to rest this worry, and opened the way for all employers to safely amend their extension of time clauses by making the giving of notice a condition precedent to the grant of an extension of time, thus making life ever more onerous for a contractor.

However, the recent case of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (20 December 1999), has revisited this decision.

The facts of the case are simple. The employer, Gaymark Investments entered into a contract with the Contractor, Walter Construction for the construction of a hotel, retail and office complex in Darwin, Australia. Delays occurred to the progress of the works, including a 77-day delay for which the employer was responsible.

The conditions of contract provided that the Contractor had an entitlement to an extension of time for delays caused by the employer, but only where:

*"The Contractor has complied strictly with the notice provisions of sub-clause SC19.1 and in particular has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause."*

The Contractor failed to get his notice in within the 14 days required and as a result thereof the employer took liquidated damages for the period of his own delay. The matter went to arbitration where the

arbitrator held that the delays caused by the employer were acts of prevention making the time for completion at large and removing the employer's right to take liquidated damages. The employer appealed.

In the appeal the contractor argued that the arbitrator was correct in his award. The employer had prevented completion by the date set out in the contract and no extension of time was possible. The contractor relied upon the landmark decision in this situation in *Peak Construction (Liverpool) Ltd v McKinney Foundations* (1970) 1BLR 111 where Salmon LJ held:

*"If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract then the extension of time clause should provide expressly or by necessary inference for an extension on account of such a fault or breach on the part of the employer."*

The employer argued that the extension of time clause did provide for an extension of time to be granted on account of a fault of the employer, but that the contractor had itself failed to make use of the clause, and following the Turner case, and in particular the comments of Justice Cole (quoted above), it was not an act of prevention if the contractor failed to exercise its contractual rights.

Mr Justice Bailey did not agree. He distinguished the Turner case on the basis that the delaying event complained of in that case was not an act of prevention by the employer. He considered that:

*"In the circumstances of the present case, I consider that this principle (the principle in Peak Construction) presents a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own makings."* and

*"Acceptance of Gaymark's submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making (and this in addition to the avoidance of Concrete Constructions (the previous name of Walter Construction) delay costs) because of the company's failure to comply with the notice provisions of SC19."*

Accordingly, Mr Justice Bailey upheld the decision of the arbitrator that the prevention principle was applicable even where the contract provided for an extension of time to be granted for delays caused by the employer, but such an extension was unable to be granted because the contractor had failed to comply with a condition precedent

for giving notice. The court held therefore that time was at large and that Gaymark could not claim liquidated damages for the delays incurred.

The traditional fears of contract draftsman were therefore realised. Whilst this decision has not yet been considered by the courts in Hong Kong, employers and their advisers when drafting contracts may now well think twice before including notice provisions that are conditions precedent to the grant of an extension of time.

(Adopted from the HKIS Newsletter 10(9)a October 2001)